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No. 93-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DREXEL BURNHAM LAMBERT GROUP INC.,

Petitioner,

VS.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE DREXEL BURNHAM LAMBERT GROUP INC. IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

THOMAS W. HILL, JR., ESQ.
2627 Muirfield Court
West Palm Beach, Florida 33414
(407) 793-4031

Co-Counsel for Petitioner

EDWARD L. POWERS, ESQ.
Counsel of Record
JOEL L. DEMPSEY, ESQ.
RICHARDS & O'NEIL
855 Third Avenue
New York, New York 10022
(212) 207-1200

Counsel for Petitioner

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Petitioner, The Drexel Burnham Lambert Group Inc. ("Drexel"), respectfully submits this brief in reply to Respondents' opposition to Drexel's Petition for a Writ of Certiorari filed February 28, 1994.

I. Waiver

There is no factual dispute. The only issue is whether the Second Circuit's decision effectively eliminates the implied waiver exception of the FSIA. Given the plethora of evidence (unchallenged by Respondents) establishing the Committee's conscious decision to take part in and defend the action, the appellate court's decision will disrupt the certainty of proceedings in U.S. courts and invite foreign state litigants to assert immunity years after answering a complaint (as was done here). Review should be granted to correct the decision of the Second Circuit

and restore the obligation of parties seeking to contest jurisdiction to do so at the outset of litigation.

A. The Committee's Unrestricted Submission To Jurisdiction In A Representative Capacity Constituted A Waiver Under the FSIA.

Respondents emphasize that the Committee submitted to the district court's jurisdiction in a "representative" capacity. Under the FSIA, however, this is irrelevant. There is no special grant of immunity for "representative" submissions to the court's jurisdiction. Respondents cite no FSIA provision or decision of any court that supports their claim that the Committee's appearance as a representative of Galadari in any way affects the Committee's voluntary submission to jurisdiction in Drexel's action. (The court below did not even base its decision on this factor. PA 17a-19a.) Moreover, the Committee was well aware that it was considered a party for all purposes as early as 1985, when the Second Circuit rejected the Committee's attempt to make essentially the same argument. *Drexel v. Galadari*, 777 F.2d at 880-81. Notably, the Committee did not respond to the Second Circuit's 1985 decision by asserting immunity.

From its first appearance in this action, the Committee, as well as Drexel and the district court, fully understood the Committee's status as an agent of a foreign state. It is thus difficult to imagine a clearer instance of an affirmative and unambiguous waiver. The FSIA is clear that such a waiver cannot be withdrawn unless the right to do so is reserved in the original waiver. 28 U.S.C. § 1605(a)(1).

B. The Committee Appeared And Defended As A Successor To The Non-Immune Defendants' Assets.

Respondents recreate history by implying that the Committee appeared in the Drexel action in 1984 solely as a "judicial or quasi-judicial agency." Em. Br. at i.; Com. Br. at i. As the Committee, the district court and the Second Circuit have all

previously acknowledged, the Committee acted in a dual capacity. In addition to its quasi-judicial activity in Dubai, the Committee also was the successor or trustee to the Galadari assets. Comm. Br. at 3, 23; PA 4a, 24a, 57a-59a. It was in that capacity that the Committee voluntarily appeared in the district court, denied the substantive averments of Drexel's complaint, and asserted twenty-five affirmative defenses (but not sovereign immunity). *Drexel v. Galadari*, 777 F.2d at 880; PA 50a. The Committee itself advised the Second Circuit in 1985 that it is the "successor" to Galadari and his companies. In denying Respondents' motions to dismiss, the district court found that the Committee was subject to jurisdiction in its non-judicial capacity, as noted by Second Circuit Chief Judge Newman in his dissent:

> The District Court, in its careful and comprehensive opinion upholding the sufficiency of the Complaint, demonstrated a sensitive awareness of the dual nature of the Committee's activity. Judge Motley wrote:
>
> > While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction in this matter is based upon the latter.
>
> *Drexel v. Galadari*, 810 F. Supp. at 1391.

PA 29a.

C. The Amended Complaint Includes The Same Claims That Were Pending When The Committee Voluntarily Submitted To The District Court's Jurisdiction.

Respondents attempt to circumvent the Committee's waiver by contending that a foreign state's appearance in a "limited, representative capacity" does not waive immunity "with respect to unasserted future claims. . . ." Em. Br. at 19; Com. Br. at 16-17. Both assertions misstate the record.

First, the Committee *did not* enter a "limited" appearance. It fully answered the complaint, without reservation. Respondents engage in pointless conjecture by arguing that the Committee could not have asserted immunity when it submitted to the district court's jurisdiction in 1984. To the contrary, the Committee was free to assert immunity when it appeared. Indeed, as Respondents point out repeatedly, the Committee allegedly did "invoke" immunity years later, but prior to the filing of Drexel's and Refco's amended complaints.

Second, Drexel's amended complaint repeats the claims that were pending at the time of the Committee's voluntary appearance, and names Respondents as the parties that succeeded to the Galadari debts. The pleading is not limited to "entirely new claims" as Respondents would have this Court believe. Com. Br. at 7. Respondents' waiver of immunity by virtue of the Committee's unrestricted, voluntary appearance in the Drexel action certainly applies to the claims pending at the time of the appearance.[1]

The FSIA simply does not permit the "hit and run" tactics countenanced by the Second Circuit's decision.

II. Commercial Activity

Respondents contend that the FSIA's commercial activity exception is inapplicable because the sole "act" upon which Drexel's claims are based was a judicial or sovereign act, *i.e.*, the Committee's 1991 decision denying payment to Drexel and Refco. Despite the plain language of the FSIA, Respondents argue that the requisite "act" must be commercial in order to meet the exception. Respondents are wrong on the facts and the law.

First, Respondents ignore the fact that the Committee is the successor to the Galadari assets, as the Committee acknowledged

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[1] Drexel's amended complaint also includes claims based on the conduct of Respondents after the initial complaint was filed. These new claims meet the commercial activity exception to immunity.

to the Second Circuit in 1985. (Thus, Respondents' repeated assertions that the Committee is not the "obligor" on the Galadari debts is erroneous. Com. Br. at 4, n.5; Em. Br. at 5, n.6.) Consequently, Respondents are obligated to Drexel based on their predecessors' acts of nonpayment, as well as the Committee's acts of nonpayment after succeeding to the Galadari assets. The mere fact that, after many years of delay, the Committee donned its "judicial" hat and issued a "decision" does not mean that this is the sole act upon which Drexel's claims are based. *See* PA 29a. In any event, the conduct of the Committee, as found by the district court following full evidentiary hearings, was anything but "judicial." The Committee delayed acting on Drexel's and Refco's claims, orchestrated evidence adverse to those claims, and refused to pay Drexel and Refco, to the commercial benefit of the Emirate. (The largest claims against the former assets of Galadari Holdings were asserted by the Emirate's bank, the Union Bank.)

Second, the Committee misreads the statute. Regardless of whether the "acts" at issue are commercial or sovereign or both, a U.S. court is vested with jurisdiction if the acts were taken *in connection with* commercial activity. 28 U.S.C. § 1605(a)(2). The FSIA does not state that the act at issue must be commercial, in whole or in part. The Emirate's interpretation of *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992) (Em. Br. at 13-14) merely re-states the holding — the foreign state's activity at issue "qualified as commercial activity for purposes of the [FSIA]. . . ." *Saudi Arabia v. Nelson*, 113 S. Ct. at 1479. In *Weltover*, the commercial activity consisted of the foreign state's issuance of bonds, 112 S. Ct. at 2167-68, although the "act" taken in connection with this commercial activity (and upon which plaintiffs based their claims) was arguably sovereign (the unilateral rescheduling of the debts pursuant to Presidential Decree). *Id.* at 2164. Similarly, there is no question that Respondents were engaged in related commercial activity (the operation of Holdings and the Union Bank) when they refused to honor their predecessors' debts. Their refusal to pay Drexel and Refco had a direct connection to the commercial interests of the Emirate, because funds that should have been paid to Drexel and Refco instead went to the Emirate's commercial enterprise, the Union Bank.

CONCLUSION[2]

For the reasons set forth in Drexel's Petition and this reply, Drexel respectfully submits that the Petitions of Drexel and Refco for review of the decision of the United States Court of Appeals for the Second Circuit should be granted.

Dated: April 8, 1994

Respectfully submitted,

EDWARD L. POWERS, ESQ.
Counsel of Record
JOEL L. DEMPSEY, ESQ.
RICHARDS & O'NEIL
885 Third Avenue
New York, New York 10022
212/207-1200

- and -

THOMAS W. HILL, JR., ESQ.
2627 Muirfield Court
West Palm Beach, Florida 33414
407/793-4031

[2] In its opposition brief, the Emirate raises a number of other defenses that were rejected by the district court and not addressed by the Second Circuit. Em. Br. at 20-26. Consequently, these "other defenses" have no bearing on the reasons why the Second Circuit's decision should be reviewed and corrected by this Court. Nonetheless, Drexel respectfully refers the Court to Petitioner Refco's reply brief, which addresses the Emirate's other defenses.